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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,) CR 07-0295 MAG
Plaintiff,)
v.) DEFENDANT'S REPLY RE:
NICOLE LEA MAYS,) PROPOSED JURY INSTRUCTIONS
Defendant.)
Pretrial Date: April 1, 2008
Time: 2:00 p.m.
Court: The Honorable Elizabeth
D. Laporte

I. MERE PRESENCE INSTRUCTION

The government is conflating principles of possession and knowing possession in its Response to Defendant's request for a jury instruction. Whether or not Ms. Mays is entitled to the "mere presence" instruction has nothing to do with her ownership of the automobile in question. Instead, the issue before the jury is whether or not Ms. Mays knowingly possessed heroin. The point of the mere presence instruction is to ensure that the jury does not convict Ms. Mays of possessing heroin simply because she was present in an automobile where heroin was located. This is the reason that the instruction is requested.

¹The government's citation to *United States v. Medrano*, 966 F.2d 1277 (9th Cir.

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1 1993) is extremely misleading. In that case, Medrano challenged both the possession
2 instruction and requested the mere presence instruction, on separate grounds. In that case,
3 the Court did not decline to instruct on mere presence because Medrano had constructive
4 possession of the vehicle; the two issues were addressed in separate contexts. The
5 constructive possession issue was raised by the Court of Appeals in response to
6 Medrano's argument that insufficient evidence existed to convict him of the charge. *See*
7 *id.* at 1218. In a separate section having nothing to do with constructive possession, the
8 Ninth Circuit affirmed the district court's denial of the mere presence instruction because
9 "Medrano engaged in affirmative conduct showing his intent to possess the contraband."
10 *Id.* at 1219. Ownership or control over the vehicle had nothing to do with the court's
11 calculus on this instruction. As such, the government's *Medrano* argument in its
12 Responsive Brief is erroneous.

13 Importantly, the mere presence instructions ensures that "knowing spectators" are
14 not convicted of crimes. Here, unlike the defendant in *United States v. Velarde-Gomez*,
15 224 F.3d 1062, 1074-75 (9th Cir. 2000), Ms. Mays is a driver of a car with several
16 passengers. See *id.* at 1075 (stating that *Velarde-Gomez* was the driver and *sole occupant*
17 of the automobile in which 63 pounds of marijuana was found). If the drugs in question
18 did not belong to Ms. Mays, and she was simply a "knowing spectator" to the possession
19 and use of drugs by Ms. Benzon and Mr. McNatt, she is not guilty of the charged crime.
20 The mere presence instruction makes clear to the jury that an individual cannot be
21 convicted of possessing drugs simply by sitting in a car in which drugs are located.

22 The government argues that their case on the heroin charge does not merely rest on
23 Ms. Mays' presence in the automobile. The only evidence pointed to in this case other
24 than Ms. Mays' presence is Officer's Hart's statement that Ms. Mays admitted that the
25 heroin was hers. As previously argued, Officer Hart's statement is flatly refuted by Ms.
26 Mays and Ms. Benzon. Moreover, Officer Hart has made additional statements in this
27 matter of dubious credibility, as noted previously by this Court. Should the jury fail to
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1 believe Officer Hart's testimony, the government has no remaining evidence against Ms.
2 Mays on the heroin charge other than her presence in the automobile. Accordingly, the
3 mere presence instruction is warranted in connection with the heroin charge.

4 In the alternative, Ms. Mays proposes that the Court wait until the conclusion of
5 all the evidence to rule on defendant's request for a "mere presence" instruction, as the
6 Court will be in a much better position to evaluate the propriety of the instruction once
7 the evidence is submitted.

8 **II. POSSESSION INSTRUCTION**

9 The instruction proposed in *United States v. Cain*, 130 F.3d 381 (9th Cir.
10 1997) is identical to the instruction requested by the defense, except that the defense's
11 instruction follows the Model Instruction requiring the conjunctive "and" rather than
12 "or." The defense thus has no objection to the Court instructing the jury in accordance
13 with *United States v. Cain*, as long as the conjunctive "and" is used to ensure that the jury
14 understands that the defendant must both 1) know of its presence and 2) have physical
15 control, or the power and intention to control.

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17 Dated: March 28, 2008

18 Respectfully submitted,

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20 BARRY J. PORTMAN
Federal Public Defender

21 /S/
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23 ELIZABETH M. FALK
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